

BRIEFING NOTE FOR THE MINISTER OF NATIONAL DEFENCE

UPDATE ON ENGAGEMENTS WITH ABORIGINAL GROUPS REGARDING THE DISPOSAL OF ROYAL ROADS UNIVERSITY LANDS

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ISSUE

1. This briefing note provides an update on discussions that are being held with Aboriginal groups regarding the disposal of Royal Roads University lands. Representatives from ADM(IE) have met with the Songhees Nation and Esquimalt Nation on a regular basis since the beginning of June 2016. Discussions have been positive.

BACKGROUND

2. The 1994 Federal Budget announced the closure of the Royal Roads Military College in Victoria, British Columbia. Since the closure of the College, the lands and buildings have been used by Royal Roads University through a lease and Memorandum of Agreement.

3. DND maintains 20 Residential Housing Units within the leased area on the Royal Roads property which are all currently occupied.

4. DND is committed to supporting the continued operations of Royal Roads University in its current location and is keeping the University informed as the process moves forward.

5. The disposal process has been initiated and the site survey, title search and notice of excess have been completed.

6. Located within the City of Colwood, the Royal Roads lands are viewed as an important green space to the City and its citizens. Colwood is currently developing a new Official Community Plan and this disposal was referenced at a council meeting on 19 December 2016. Since then there has been some positive media interest. Community concerns have been raised over developing the land which may change community access and may have possible impacts on species at risk and old growth forest. Former Royal Roads Military College alumni may also have questions. Media response lines have been updated.

CONSIDERATIONS

7. The Songhees and Esquimalt Nations are interested in acquiring the Royal Roads lands. The number of interested Aboriginal groups may increase following further analysis and consultation. Letters to other Aboriginal groups soliciting their interest are expected to be sent out in early February 2017.

8. The Te'mexw Treaty Association, of which the Songhees Nation (but not Esquimalt Nation) is a member, is in the last phase of comprehensive land claim negotiations; land had frequently arisen during these discussions as there is limited Crown land available for treaty land

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selection in the Victoria area. Without an adequate land package, the Songhees Nation may not be able to recommend that their community approve the treaty. In order to support INAC, DND has expedited efforts to dispose of Royal Roads lands; however, these discussions are taking place outside of the treaty process. The Esquimalt Nation is not participating in comprehensive land claim negotiations, but must also be included in this process because this property is within their claimed territory.

9. The Songhees Nation wrote to DND and INAC several times earlier in 2016. Their last letter to DND (8 July 2016 – Annex A) alluded to bad faith negotiations on behalf of Canada and suggested that litigation would be considered should meaningful discussions regarding Royal Roads lands not commence.

10. Both Nations hope to access funding from Canada to participate in this process or talks may stall. DND and INAC are exploring funding options.

11. There is a realization that DND's disposal process of this property may not proceed quickly enough to allow the land to be added to the treaty settlement package before the negotiating mandates expires.

12. A team from ADM(IE) and DOJ meet regularly with the Songhees and Esquimalt Nations to discuss this disposal and these meetings are progressing well. An engagement process that is transparent, respectful, collaborative and timely has been established. The last meeting was held on 24 November 2016 and both Nations attended. Details of a mapping project for the property, communication principles and funding options were discussed.

CONCLUSION

13. Discussions regarding the Royal Roads lands are progressing positively with the Songhees Nation and Esquimalt Nation; however, funding and the speed with which this disposal can be concluded are at issue. DND is treating this disposal as a priority in order to support Canada's focus on reconciliation.

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Date Prepared:

11 January 2017

Annexes:

Annex A: Letter from the Songhees Nation to the Minister of National Defence, 8 July 2016.



SONGHEES NATION

July 8, 2016

Delivered by courier

The Honourable Harjit S. Sajjan
Minister of National Defence
101 Colonel By Drive
Ottawa, Ontario K1A 0K2

Dear Minister Sajjan:

RE: Negotiation in Bad Faith Regarding the Royal Roads/Hatley Park Property

I write further to my letters of February 4, 2016, May 10, 2016, May 17, 2016 and May 26, 2016 regarding my grave concerns about the approach Canada, and the Department of National Defence (DND) in particular, has taken to the possibility of disposition of federal lands occupied by DND at Royal Roads/Hatley Park for use as treaty settlement land in Songhees' modern treaty package. In this letter we detail the following issues relevant to Canada's conduct in relation to Royal Roads/Hatley Park:

- Songhees' use of our territory prior to contact with Europeans;
- The breach of the Douglas Treaty promises as the result of the displacement of Songhees people from our territory;
- Our need for land and expectations in entering the modern treaty process;
- The shortage of land available for settling our modern treaty;
- The status of Royal Roads/Hatley Park as surplus to DND operational needs;
- Our repeatedly expressed interest in the lands at Royal Roads/Hatley Park; and
- DND's unwillingness to engage with Songhees regarding Royal Roads/Hatley Park.

In the context of the circumstances outlined in this letter, DND has an obligation to negotiate with us in good faith regarding the potential use of Royal Roads/Hatley Park as Treaty Settlement Lands for Songhees. Instead, DND has repeatedly refused to engage with Songhees in any meaningful way regarding the future of the lands at Royal Roads/Hatley Park, refused to provide relevant information and generally delayed or attempted to avoid responding to Songhees requests for engagement. Such action on the part of Canada is in breach of the Honour of the Crown and the duty to negotiate in good faith. As we have previously expressed to Anita

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Boscariol of Indigenous and Northern Affairs Canada, if steps are not taken by Canada to engage in a process of meaningful negotiation regarding these lands prior to July 15 Songhees will have no choice but to consider taking legal action.

Impacts of the Interaction between Songhees and the Early Settlers of Vancouver Island¹

Songhees are a descendant group of the Lekwungen, a Coast Salish people who have occupied Southern Vancouver Island since time immemorial. Songhees' traditional territory extends from Cowichan Head at the north end of Cordova Bay to Parry Bay, West of Albert Head, and east into what is now the San Juan Islands in the state of Washington. Evidence of our use of this territory is found in Songhees oral history, ethnographies of the Vancouver Island region, and archaeological sites – including historic villages, shell middens and burial sites – found across southern Vancouver Island and the surrounding islands and islets. These archaeological sites are located at various sites around Victoria including Laurel Point, an old Songhees cemetery, midden deposits and village debris around McNeil Bay, a large midden in Witty's Lagoon,² burial and village sites on Discovery, Chatham and Halkett Islands and the Royal Roads/Hatley Park property, which contains 8 recorded archaeological sites of various types.³

Prior to contact with Europeans, Songhees villages dotted the shoreline of southern Vancouver Island from Cadboro Bay to Ross Bay and the small islands off of it including, Chatham and Discovery Islands, collectively known in our language as "Tl'eches". After the Hudson's Bay Company (HBC) established Fort Victoria in 1843, many Songhees families congregated in a village on the northwest shore of what is now Victoria's Inner Harbour. Songhees people provided wood to Governor Douglas, for a price, for the construction of the Fort and acted as labourers in its construction. After the Fort was complete the Songhees became primary trading partners of the HBC, particularly to supply the Fort with salmon for consumption (the Fort was dependent on the labour of the Aboriginal people for salmon and potatoes) but also for international distribution.⁴ The Fort Victoria Journals from 1846 – 1850, the only surviving journals from that post, provide evidence of this, with at least 28 references regarding trade by Songhees, mostly salmon in amounts ranging from a few at a time to 3000 fresh salmon in one

¹ A detailed description of early contact between settlers and the Songhees can be found in Keddie, Grant. *Songhees Pictorial: A History of the Songhees People as seen by Outsiders, 1790-1912*. Victoria: Royal BC Museum, 2003 ("*Songhees Pictorial*") and Lutz, John Sutton. *Makuk: A New History of Aboriginal-White Relations*. Vancouver UBC Press, 2008 ("*Makuk*").

² *Songhees Pictorial* at p. 56.

³ Royal Roads University, 2006 Campus Plan, http://www.royalroads.ca/sites/default/files/reports_files/pdf/Plans_and_Reports/2006_-_Royal_Roads_University_Campus_Plan.pdf at p 11.

⁴ See *Makuk*, p. 75-76 and see generally Mackie, Richard. *Trading Beyond the Mountains: The British Fur Trade on the Pacific, 1793-1843*. Vancouver: UBC Press, 1997.

day. Excerpts from these journals are attached in **Appendix A**. In 1849 alone the Fort salted 500 barrels of salmon for overseas markets.⁵

The Douglas Treaties

In 1849, the British government declared Vancouver Island a Crown Colony and granted the land to the Hudson's Bay Company for the purpose of settlement. James Douglas, Chief Factor of the Company and, (as of 1851) the Governor of Vancouver Island, was authorized to seek to negotiate treaties with the Aboriginal people on behalf of the Crown. James Douglas wrote to the HBC to recommend that the fisheries of the Aboriginal people be reserved for their benefit and fully secured to them by law "equally, as a matter of justice, and from regard to the future peace of the colony."⁶ The HBC secretary Archibald Barclay replied, instructing Douglas that "The right of fishing and hunting will be continued to them" in the treaties.⁷

In 1850 James Douglas treated with the Lekwungen through several written treaties or one oral treaty (there are different perspectives on this point), subsequently set out in written form by Douglas (at the treaty negotiations, the signatories actually signed blank pieces of paper proffered by Douglas). These treaties involved, at least, the Chekonein, Swenghung, Chilcowitch, Kosampsom, Whyomh'th and Teechamitsa families or local groups. This last treaty with the Teechamitsa covers the land now occupied by Royal Roads/Hatley Park. Attached as **Appendix B** is the language from the written form of the Douglas Treaty with the Teechamitsa.

No court has yet determined the scope of any alleged surrender in the Douglas Treaties. Songhees maintains that any purported surrender in the Douglas Treaties is ineffective, and we continue to assert Aboriginal rights and title. It is our position that the effect of the Douglas Treaties was not to extinguish our Aboriginal title in its entirety, for the following reasons. First, it is clear that the words used in concluding an oral agreement did not include the conveyance described in the written text, and would not have been understood by the Lekwungen to result in complete extinguishment of Aboriginal title. Second, the consideration paid in the treaties was inconsistent with the extinguishment of Aboriginal title. The colonial practice at the time was to pay fair market value for land surrendered in treaty, as is confirmed by Commissioner William B. Robinson's comments in negotiating the Robinson Huron Treaties in 1850. During those treaty negotiations the Ojibway complained that they were being offered less compensation in their treaty than Indians further south. Robinson explained to the Ojibway that they would not receive the full value of their lands in treaty because they would still be able to hunt and fish on their lands which, unlike those to the south, would probably never be settled:

⁵ *Makuk*, p. 75-76, citing W.C. Grant to Brodie, August 8, 1851, in J.E. Hendrickson, ed. "Two Letters from Walter Colquhoun Grant" *BC Studies* 26 (1975): 12.

⁶ Douglas to Archibald Barclay, HBC Secretary, 3 September 1849, in Hartwell Bowsfield, ed., *Fort Victoria Letters: 1846-1852* (Winnipeg: Hudson's Bay Record Society, 1979), 43.

⁷ Barclay to Douglas, 17 December 1849, A.6/28 fos. 90d-92, Hudson's Bay Company Archives, Archives of Manitoba, Winnipeg.

I explained to the chiefs in council the difference between the lands ceded heretofore in this Province, and those then under consideration, they were of good quality and sold readily at prices which enabled the Government to be more liberal, they were also occupied by the whites in such a manner as to preclude the possibility of the Indian hunting over or having access to them: whereas the lands now ceded are notoriously barren and sterile, and will in all probability never be settled except in a few localities by mining companies, whose establishments among the Indians, instead of being prejudicial, would prove of great benefit as they would afford a market for any things they may have to sell, and bring provisions and stores of all kinds among them at reasonable prices.⁸

This position is reinforced by the circumstances and wording of these particular treaties, which show the Crown clearly anticipated that the Lekwungen would continue to use the surrounding lands and waters to support ourselves and sustain our way of life. Third, any such complete surrender of Aboriginal title would have been inconsistent with the Crown's fiduciary duty given the marginal compensation paid. It is therefore better to understand any surrender to the Crown as not purporting to be a complete surrender of Aboriginal title.

In any event, if the Crown intended a complete surrender of Aboriginal title it would be unconscionable for the Crown to rely upon it given the extent to which the benefits of treaty have largely been denied to us as a result of the disruption of our way of life in our territory, as discussed in further detail below. In our view the so-called sale or surrender is better understood as a recognition that land outside Songhees' reserves would be shared for the use and benefit of both Aboriginal and non-Aboriginal people. In this context, it is clear that Aboriginal title continues at least to the extent of requiring the Crown to accommodate Songhees in whatever way possible including by identifying lands for treaty settlement purposes and negotiating in good faith with respect to those lands.

Displacement of Songhees

Over time there have been several attempts to displace Songhees from our villages. In 1844, Chief Factor Roderick Finlayson forced the Songhees to move our community from James Bay to Songhees Point, on the other side of the Harbour, after a skirmish between the Songhees and Cowichan.⁹

In 1859, members of the settler population in Victoria began calling for another removal of Songhees from the Victoria Harbour area where our reserve had been confirmed. Governor Douglas's response noted that the treaties had guaranteed to us the enjoyment of our village sites along with our fishing and hunting rights. Instead Governor Douglas leased out portions of the

⁸ Robinson to Bruce, 24 September 1850, as cited in Morris, Alexander. *The Treaties of Canada with the Indians of Manitoba, the Northwest Territories and Kee-wa-tin*, Toronto: Belford, Clarke and Co., 1880.

⁹ *Songhees Pictorial* at p. 24.

reserve not being used by Songhees and stated he would use the proceeds to improve the condition of the Songhees people. After Douglas retired in 1864 these leases were cancelled. In 1910 the opponents of the Songhees succeeded and the Crown relocated the reserve to Esquimalt Harbour. Despite the agreement to this move by Songhees leadership at the time, many Songhees members opposed the move. The move was confirmed by legislation, *An Act respecting the Songhees Indian Reserve*, passed in the House of Commons on May 19, 1911, and on December 19, 1911 an Order of the Privy Council recognized the official surrender of the Songhees reserve and the move to New Songhees Reserve, No. 1A.¹⁰

Urbanization and Resource Competition

The arrival of European settlers to Victoria brought with it certain benefits to Songhees such as a new trading partner in the HBC, settlers to sell goods to in town such as fish, game and crafts and the possibility of paid employment.¹¹

However, it also brought many negative effects. Our population collapsed as the result of the introduction of European diseases such as smallpox and tuberculosis. Some estimates put our population at around 1600 prior to these epidemics, and show our population rapidly dropping to 700 in 1850, 285 in 1864 and 182 in 1876.¹²

Agriculture and then urbanization eliminated our hunting and harvesting grounds making it increasingly difficult to access traditional foods in our territory. Hunting is now impossible within our traditional territory and harvesting of traditional plants such as camas was nearly eliminated, although we are working hard to revitalize this practice.

Songhees dominance of commercial trade in fish on Vancouver Island gradually diminished as Songhees people were pushed out of the commercial fisheries by, for example:

- a) discriminatory regulation that targeted or had disproportionate affects on Aboriginal fisheries such as:
 - i. the artificial separation of Food, Social and Ceremonial ("FSC") and commercial fishing;
 - ii. bans on traditional fishing methods such as fish traps, weirs and reef netting;
 - iii. restrictions on Aboriginal ownership of vessels;
 - iv. prohibitions on Aboriginal people selling fish;
 - v. failure to preserve traditional fishing areas or outright prohibitions on fishing in certain traditional fishing areas such as the Gorge waterway in Victoria;
 - vi. preferential licencing of large producers;
 - vii. licence limitation;
 - viii. preferential access for sport fishermen; and

¹⁰ *Songhees Pictorial* at p. 149.

¹¹ *Songhees Pictorial* at p. 112.

¹² *Makuk* at p. 86.

- ix. prohibitions on non-whites fishing under "independent" licences (not tied to canneries).
- b) the introduction of European fishing technologies (and the increasing expense of keeping up with larger and faster fleets);
- c) the impact of residential schools on fishing knowledge transfer between generations;
- d) the inability to use collateral to access expensive fishing vessels and equipment as the result of *Indian Act* provisions that discourage lending to status Indians; and
- e) increasing, coerced dependence on a cannery industry that later collapsed.¹³

Our fisheries were once a traditional source of sustenance and wealth for our community. We now have only a few members with their own fishing vessels. The encroachment of urban development and the undercutting of our traditional economies left Songhees in an impoverished position from the early to mid 1900s that our community has worked hard to try to recover from. In the 20th and 21st centuries our rights to hunt and fish have been honoured only in the breach as we have been crowded out of our own territory. Given the breaches of the treaty promise that the Songhees could continue our way of life through hunting and fishing in our territory, the Crown is under a positive obligation to remedy those breaches through whatever means can be found including identifying lands that Songhees might use for community, cultural or economic purposes and negotiating in good faith with respect to those lands.

Songhees in the Modern Treaty Process

Background

In 1990, leaders of BC First Nations, represented by the First Nations Summit, met with the Prime Minister of Canada and the Premier of British Columbia to push for the appointment of a tripartite task force to develop a process for land claim negotiations. In 1990 the British Columbia Claims Task Force was established by agreement between the three parties and consisted of three representatives of BC First Nations, two from Canada and two from British Columbia. The Task Force was asked to provide recommendations on the scope of negotiations, the process for negotiations, interim measures and public education.

The Task Force released its report on June 28, 1991, attached as **Appendix C**. Among the Task Force's 19 Recommendations were the following:

1. The First Nations, Canada, and British Columbia establish a new relationship based on mutual trust, respect, and understanding—through political negotiations.
2. Each of the parties be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship.

¹³ For a description of the process of exclusion of Aboriginal people from the commercial fishery please see Harris, Douglas C. *Landing Native Fisheries: Indian Reserves and Fishing Rights in British Columbia, 1849-1925*. Vancouver: UBC Press, 2008.

16. The parties negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected which could undermine the process.

The recommendations of the Task Force formed the basis of the BC Treaty process now in place. On or about September 21, 1992, Canada, BC and the First Nations Summit executed the British Columbia Treaty Commission Agreement, attached as **Appendix D** to this letter. Paragraph 13.1 of the Agreement states specifically that the Task Force Report may be used as an aid to the interpretation of the Agreement.

The BC Treaty Commission began accepting Statements of Intent on December 15, 1993.

On or about 1995 Parliament passed the *British Columbia Treaty Commission Act*, SC 1995, c 45 and British Columbia passed the *Treaty Commission Act*, RSBC 1996, c 461, to establish the BC Treaty Commission as they had committed to do in the Agreement, and on or about May 1995 the First Nations Summit adopted a companion resolution to this effect.

Land Selection for Songhees Nation

In 1994 Songhees entered the BC modern treaty process and filed its Statement of Intent Area map, which was revised in 1998. A map of Songhees' Statement of Intent Area is attached as **Appendix E** to this letter.

The parties signed a Framework Agreement on December 5, 1996 and began substantive negotiations. This Framework Agreement is attached as **Appendix F**. The parties began discussing land selection in late 2002 and conducted detailed evaluations of potential treaty settlement land. The process of land selection is more difficult for Songhees than it might be for other First Nations given our urban location. Songhees' SOI includes 21,780 ha of land but very little of it is actually available for use as treaty settlement land.

The Crown's starting point for land selection discussions was that, as a matter of policy, Songhees could only select provincial Crown land or federal Crown land that had been declared surplus to the needs of the federal department that occupied it. The province provided us with information regarding the ownership of lands within Songhees SOI Area (Crown land, private or mixed). We used this information to identify a "wish list" of parcels we were interested in for use as TSL which included Royal Roads/Hatley Park. In developing this wish list, the priorities of the Nation and the potential use of the parcel was considered and whether, like in the case of community expansion, this use required proximity to existing reserve lands. We provided a map of these parcels to Canada and BC in 2003 showing Royal Roads/Hatley Park as an area of "high interest" to Songhees for use as treaty settlement land.

Through agreement with Victoria area municipalities, we obtained access to the Integrated Cadastral System which provided more detailed data than the province's mapping. It showed

subdivisions and included ownership information. We overlaid our own preferred land selections on this data, and began evaluating the suitability of parcels.

In evaluating the suitability of parcels we looked at several different criteria including:

- how large the parcel was;
- if it was in the Agricultural Land Reserve;
- the ability to service the parcel;
- how much of the parcel was above a 30 degree slope;
- how much was on bedrock;
- whether it was on a floodplain;
- any environmentally sensitive areas;
- best and highest use; and
- any encumbrances we were aware of.

Where we saw no potential to develop land or the use the land permitted was of limited interest, the parcel fell off of our list of candidate lands. Some provincial lands were needed in the provincial interest such as land needed for fire suppression or parks, and these were also eliminated from the list of candidates. After this first phase of land selection we did not have enough viable candidate lands to choose from to create a meaningful land package for our modern treaty negotiations.

We went through several rounds of land evaluation in order to compile a sufficiently long list of candidate lands. During this time and independently of the treaty process, Canada decided it wanted to reduce the amount of Payment in Lieu of Taxes (PILT) paid by the Department of National Defence and DND began a process of prioritizing land for disposal. Representatives of Songhees met with Don Beamish, Properties Officer at the Department of National Defence who was spearheading the effort locally for DND land disposition. DND gave Songhees representatives a tour of DND properties in our SOI including CFB Naden, Colwood and Royal Roads/Hatley Park. Mr. Beamish suggested we could present our interests to him and he would indicate whether any were impossible for DND. We provided a wish list of DND lands which included CFB Naden, Colwood and Royal Roads/Hatley Park. Mr. Beamish indicated that none of these lands were out of the question, but that there was a long process to go through before any DND lands would be disposed of.

Land selection discussions continued. We provided a counter-proposal in March 2009 that included significantly more land including part of the Royal Roads/Hatley Park property. Canada and the Province's proposals did not include any parcels appropriate to fulfill Songhees' community housing needs. The properties put forward were small, urban parcels potentially useful for economic development but not for community expansion or cultural purposes.

Our land evaluation process identified some federal lands that appeared to be suitable and not required by the Department of National Defence for operational purposes. However, despite the Crown's clear inability to assemble an acceptable land package for Songhees using provincial Crown land, Canada refused to deviate from its policy that only land that had already been declared surplus may be discussed at the treaty table. This removes almost all federal land within Songhees' SOI from discussion and leaves Songhees with very limited potential TSL within our territory.

From the very beginning of the process, Songhees has consistently expressed our key objective of obtaining more land for our community. We have made it clear this is one of our highest priorities, and that without an adequate land package, Songhees Council cannot recommend that our community sign a Final Agreement.

The Slow Pace of Negotiations

As noted earlier, we entered into the BC treaty process more than 20 years ago. Negotiations have been fraught with delays and have slowed or stopped several times on account of the BC Treaty Negotiations Referendum in 2002, provincial elections in 1996, 2001, 2005, 2009 and 2013, and federal elections in 1997, 2000, 2004, 2006, 2008, 2011 and 2015. In the lead up to elections little progress is made on substantive issues for several months in advance of and after the elections, which can result in as much as six months of decelerated or stalled negotiations.

Signing an Incremental Treaty Agreement and the Agreement in Principle

In 2012 we concluded an Incremental Treaty Agreement (ITA) and received our first two ITA parcels. A map of our ITA lands is attached as **Appendix G**. In July 2012 we made a counter proposal for our land package, which now also included the ITA lands, as they are counted towards our final treaty package. The Crown then made their Agreement in Principle (AIP) land and cash offer which promised Songhees only 0.49 ha of new land as TSL, none of which was contiguous with Songhees' existing reserves. The AIP is not legally binding and is a without prejudice document. However, the miniscule size of our land package in the AIP compared to other modern treaty nations illustrates how little progress was made on finding a suitable land package for Songhees. This comparison is set out in the table attached as **Appendix H** to this letter.

We signed the AIP on April 10, 2015 and as a result of signing obtained our third ITA parcel.

Songhees' Need for a Suitable Land Package

The Unique Situation of Songhees Nation

Songhees Nation has 567 members, 339 of which live on the Songhees residential reserve. Our residential reserve has a significant population of non-members numbering 1300 residents. Songhees has four reserves. Our main residential reserve, New Songhees 1A, consists of 66.1 ha

and we have three small island reserves, (Deadman's) Halkett Island 2, Discovery Island 3 and Chatham Islands 4 which are 0.2, 36.4 and 35.4 ha respectively.

We desperately need more land for community housing. Much of our land is held by individual Songhees members or families and developed into mobile home parks that are rented to non-Songhees members. Our reserve is the largest provider of affordable housing for the general population of the Greater Victoria area, but we lack housing for our own members. Any new land for housing of Songhees members must be contiguous with or nearby to our residential reserve. We know that other First Nations with pieces of residential land that are far apart end up separating into distinct bands, such as Okanagan Indian Band and Westbank First Nation who separated in 1963. We want to keep our community united and connected. Is it also important for the provision of services, especially to elders or impoverished community members, that community services be available in a centralized location proximate to our members' homes. Our increasing population also needs more space for community infrastructure and services. Finally, our traditional life of hunting, fishing and gathering has been severely impacted by rapid urban development in the Victoria area. For our community to prosper we need to find opportunities for economic development. These will be different from remote First Nations that may benefit from resource development in their territories.

To provide for these purposes land must be proximate to our existing community, it must be serviced, have road access and be on terrain that is appropriate for development.

The Limited Land Available in Songhees' SOI

In 2012, Peter Wainwright, a consultant for TTA, assessed the potential of the lands in Songhees' SOI for use as treaty settlement land, based on available data from 2005. His report is attached to this letter as **Appendix I**. As of 2005, of the 21,780 ha of lands within Songhees' SOI, only 987 ha (4.5%) of this land was provincial Crown land and 931 ha (4.3%) was federal Crown land, the remainder was privately owned. However, not all of this Crown land is available for treaty settlement: 483 ha (48.9%) of the provincial Crown land and 68 ha (7.3%) of the federal Crown land consists of park or protected areas; and 37 ha (3.7%) of the provincial Crown lands and 40 ha (4.2%) of the federal Crown lands are within the Agricultural Land Reserve and therefore unsuitable for use as treaty settlement land.

Songhees' residential reserve is located immediately between the municipalities of View Royal and Esquimalt and adjacent to the Esquimalt First Nation reserve. It is located in an area that is both highly urbanized and subject to significant industrial development. It is in close proximity to the naval facilities at Naden in Esquimalt Harbour, as well as industrial lands at Rock Bay, owned by Transport Canada, on the Gorge waterway. As outlined above, almost all of the land in Songhees' SOI is within the Capital Regional District and is private property. Even lands that are owned by the municipalities are considered private for the purposes of treaty negotiations. Most of the public land is part of parks, and institutions such as CFB Esquimalt, Royal Roads

University, hospitals, the legislature and other government buildings and facilities. The non-indigenous community has greatly benefited from the use of these public lands and private development in Songhees territory yet Songhees has not seen the same benefits. As a result of land being taken up in Songhees SOI for the benefit of others, the land available to Songhees as potential treaty settlement land is extremely limited.

This limited land is further constrained by the fact that several other First Nations make claims to land in our SOI. The SOI Areas of Beecher Bay First Nation, Malahat Nation and Cowichan First Nations overlap with our SOI. Our neighbours the Esquimalt First Nation, as well as the Tsartlip and Tsawout First Nations, who are not in the treaty process, assert that their territories overlap with our SOI. Our interests in land in our SOI also face competition from local governments that have also expressed interest in acquiring federal lands for local purposes.

Any Crown land within our SOI that is suitable for economic development, or especially residential purposes, is critical for the success of our treaty negotiations. After going through 10 years of land evaluation and selection as outlined earlier in this letter we have reached the conclusion that the only suitable land available for residential development in the vicinity of Songhees' reserve is federal land occupied by DND for CFB Esquimalt including the Naden, Colwood and Royal Roads/Hatley Park properties. Royal Roads/Hatley Park is the only property that we know is surplus to DND's operational needs.

Songhees Approach to Land Dispositions

Songhees understands that not all Crown land within its SOI is suitable or available for treaty settlement purposes. We have been reasonable and willing to work with both levels of government when Crown land that is not suitable or available for treaty purposes must be disposed of. We have made accommodation agreements with both the provincial and federal governments when they dispose of such land in our territory in exchange for reasonable payments or options to purchase land. One such example is the accommodation agreement with Songhees regarding the federal government's disposition of land at 816 Government St, attached at **Appendix J**. We have always been reasonable and willing to work with other governments to come to a solution on issues that affect our treaty land package.

The Royal Roads/Hatley Park Lands

The federal government purchased the Royal Roads/Hatley Park property in 1940 and converted it into the Royal Roads Military College which was in operation until about 1995. At or around this time, without consultation with Songhees despite several requests on our behalf by representatives of TTA (see Appendices Q and R), Canada entered into a long-term lease of a portion of the lands to Royal Roads University for nominal rent. At or around this same time Hatley Park was designated a National Historic Site.

The current lease of the site to Royal Roads University runs from December 1, 2000 to November 30, 2050, with one 25 year and a subsequent 24 year renewal option. It is our understanding that the remainder of the land not covered by the lease is managed by Royal Roads University according to a Memorandum of Agreement with the Department of National Defence.

Documents we obtained through an Access to Information request, attached as **Appendix K**, confirm that the Royal Roads/Hatley Park lands have been surplus to DND's operational needs since Royal Roads Military College closed in 1995. These documents further indicate that even after DND first entered into the lease with Royal Roads University, it was DND's intention to sell the unleased portion of the property and the Memorandum of Agreement with Royal Roads University to manage the unleased lands was intended to be only temporary.

Canada seems to have ignored Songhees' repeated requests to declare the lands surplus and has refused to discuss them at the treaty table until they are declared surplus. This property is the only available public land that could fulfill Songhees' needs for land suitable for residential housing. Whether and how Canada disposes of this land is of paramount importance to Songhees. It is also essential to the success of the treaty process. If British Columbia and Canada are unable to provide Songhees with the land we need to meaningfully support its community, I cannot recommend to my members that they vote in favour of a treaty.

Songhees has no desire to interfere with the operation of Royal Roads University and is willing to negotiate terms that will permit it to continue to operate on those lands for the remainder of its lease (and potentially a longer period subject to negotiating suitable terms). We are also willing to negotiate how the rest of the land will be used or managed so as to take into account the heritage and ecological values of these lands that are important to both First Nations and Canada at large. Making Royal Roads/Hatley Park available for treaty negotiations should be consistent with Canada's interest in ensuring that the treaty-making process will lead to outcomes that are beneficial for all parties and which further reconciliation.

Songhees has made extensive efforts to put Canada on notice that it must be willing to consider federal land for use in Songhees' treaty package, that Songhees is interested in the Royal Roads/Hatley Park property in particular, and to engage DND in discussions about these lands. We have compiled a list of exchanges on this matter outside of the treaty land selection process in **Appendix L** and copies of related correspondence and other documents are attached in **Appendix M**. This correspondence also clearly demonstrates, as Songhees has repeatedly asserted, that our interests in the management and disposition of DND lands extend beyond the treaty process. It is not enough for DND officials to say they will continue to work with INAC to support the comprehensive claim negotiations when no meaningful process or discussions have arisen from that process, particularly given that INAC will not discuss any lands at the treaty table unless DND has declared them surplus.

Canada has Failed to Negotiate in Good Faith

It is well-settled law that the Honour of the Crown is engaged in its dealings with Aboriginal peoples. The Supreme Court of Canada has held that the Honour of the Crown is also at stake in treaty making and that in making treaties the Crown must act with honour and integrity.¹⁴ The Honour of the Crown requires negotiations of outstanding claims, leading to a just settlement.¹⁵ As part of its obligation to fulfill the Honour of the Crown, the court held in *Delgamuukw* that "the Crown is under a moral, if not a legal, duty to enter into and conduct these negotiations in good faith".¹⁶

The courts in British Columbia have held that in entering into the BC treaty process the Crown has a duty to negotiate in good faith within treaty negotiations and in related negotiations or consultation. The Honour of the Crown and the fiduciary relationship between the Crown and Aboriginal peoples are not displaced when the Crown and First Nations enter into negotiations about Aboriginal and Treaty rights.¹⁷ The BC courts have also recognized that the duty to consult and the duty to negotiate in good faith overlap such that the duty to negotiate in good faith is implicated by the disposition of lands. The Crown will be found to have violated the duty to negotiate in good faith if it breaches the duty to consult regarding land disposition.¹⁸ The courts have been clear that the duty to negotiate in good faith is not restricted to the absence of fraud and misrepresentation and includes, at a minimum, a duty to genuinely negotiate with Aboriginal claimants, the absence of sharp dealing, disclosure of relevant factors and negotiation without oblique motive.¹⁹

Given (1) Canada's unilaterally imposed position that lands that have not been formally declared surplus will not be subject to treaty negotiations; (2) the dire shortage of lands for the purpose of settling a modern treaty with Songhees; (3) the clearly expressed interest of Songhees in the Royal Roads/Hatley Park Lands; (4) the *de facto* surplus nature of these lands for any operational purposes; (5) the significant impact of the development of Victoria and the Capital Regional District on Songhees' Section 35 Rights; and (6) the nature of the obligations, commitments and expectations created when Canada entered into the British Columbia Treaty Process generally and the treaty negotiations with Songhees through the Te'mexw Treaty Association, it is our view that the Honour of the Crown and the duty to negotiate in good faith are engaged with respect to Royal Roads/Hatley Park. As a result Canada must take meaningful steps to address the availability of Royal Roads/Hatley Park for the purpose of settling a modern day treaty with

¹⁴ *R v Badger*, [1996] 1 SCR 771 at para 41.

¹⁵ *R v Sparrow*, [1990] 1 SCR 1075 at pp 1105-1106.

¹⁶ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at pp 1123.

¹⁷ *Gitanyow First Nation v Canada*, [1999] 3 CNLR 89 (BCSC) at paras 40, 65 ("Gitanyow"). *Chemainus First Nation v. British Columbia (Assets And Lands Corp.)* [1999] 3 CNLR 8 at para 26.

¹⁸ *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)* (overturned on other grounds in *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)* 2005 BCCA 128.

¹⁹ *Gitanyow* at para 74. *Chemainus* at para 26. *Luuxhon v. Canada*, [1999] 3 CNLR 89 at paras 63-65, 74.

Songhees or provide honest, clear and cogent explanations as to why it cannot proceed to do so. At the very least Canada must (without limitation):

1. Establish a process with the Department of National Defence and other relevant agencies to move these lands towards being declared surplus in a timely fashion;
2. Engage, away from the treaty negotiations, in a process of direct dialogue and consultation with Songhees concerning the disposition and future management of Royal Roads and the process of making it available for treaty negotiations;
3. Provide Songhees with timely and responsive explanations of the current status of the process of declaring these lands surplus and making them available for treaty negotiations; and
4. Make timely efforts to have these lands declared surplus and made available for treaty negotiations.

Given the circumstances described above absent some substantial reason Canada must make all or part of Royal Roads/Hatley Park available to Songhees for the purpose of settling a modern day treaty.

Canada has done none of this and has clearly breached both the Honour of the Crown and the duty to negotiate in good faith. In fact Canada has:

1. Established no discernable process for declaring Royal Roads/Hatley Park surplus;
2. Has refused to engage with Songhees or its representatives in any substantive way with respect to the future of Royal Roads/Hatley Park and its disposition;
3. Has refused to respond to Songhees' communications in a timely or forthright manner and has given no explanation, much less a reasonable explanation why these lands have not been declared surplus or made available for treaty negotiations;
4. Not made any real effort to have these lands declared surplus.

These failures have had significant detrimental effects on Songhees. They (1) threaten the viability of the modern day treaty negotiations; (2) have caused Songhees to directly or indirectly incur or waste significant costs and expense; and (3) have substantially undermined the process of reconciliation between Songhees and the Crown.

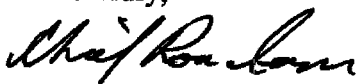
As the Court stated in *Beckman v Little Salmon/Carmacks First Nation*:

[M]odern treaties...attempt to further the objective of reconciliation not only by addressing grievances over land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities.

This cannot be achieved if Canada is failing to approach negotiations outside of treaty in good faith when they will have a significant impact on the success of treaty talks. Songhees' decades long struggle to bring DND to the table for meaningful discussions about the use of federal land for our treaty package has only damaged our relationship with our neighbours at CFB Esquimalt which we had developed through years of hard work and open communication about issues of mutual concern. At a broader level, in your mandate letter as Minister of National Defence the Prime Minister states that no relationship is more important to him than that with Indigenous peoples and recognizes the need for a renewed, nation-to-nation relationship with us based on recognition of rights, respect, co-operation and partnership. Such a statement reflects an intention to fulfill the Honour of the Crown and negotiate in good faith. We have not seen this intention reflected in our dealings with your Ministry regarding Royal Roads/Hatley Park.

If Canada, through the Department of National Defence (or such other appropriate agency) does not take immediate steps to begin meaningful discussions (as described above) about the potential use of the Royal Roads/Hatley Park lands for treaty settlement lands before July 15, Songhees will have no choice but to consider recourse to the courts.

Yours Truly,



Chief Ron Sam

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